

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHNNY L. DAVIS

Claimant

VS.

TOPEKA PLAZA INN

Respondent

AND

UNITED STATES FIDELITY & GUARANTY CO.

Insurance Carrier

Docket No. 205,740

ORDER

Respondent appeals from a preliminary hearing Order of January 30, 1996, wherein Special Administrative Law Judge William F. Morrissey granted claimant benefits in the form of temporary total disability compensation commencing October 2, 1995 and ordered ongoing medical treatment with Dr. Sankoorikal until claimant reaches maximum medical improvement, is released to a regular job or becomes re-employed.

ISSUES

- (1) "Whether the Special Administrative Law Judge exceeded his jurisdiction by ordering temporary total disability compensation commencing October 2, 1995 when the employee's entitlement to compensation is disputed without making a preliminary finding on the disputed jurisdictional issues of whether the employee suffered an accidental injury, and whether the injury was out of and in the course of his employment."
- (2) "Whether the Special Administrative Law Judge exceeded his authority in allowing receipt of additional medical records after the date of the preliminary hearing without allowing respondent's counsel an opportunity to cross exam and/or submit additional medical records or reports concerning the issue of temporary total disability."
- (3) "Whether the Special Administrative Law Judge exceeded his authority when ordering temporary total disability benefit [sic] when the copies of medical reports or other evidence which

the claimant intended to produce as it [sic] exhibits supporting their request for change of benefits were not included with their application for Preliminary Hearing as required by K.S.A. 44-534a(a)(1), and in fact were obtained after the Preliminary Hearing."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board denies respondent's request in issues 2 and 3 listed above. A review of the preliminary hearing indicates, while claimant's attorney did not attach medical documentation to his Application for Hearing, as required, respondent did not issue a timely objection to same. Conversations between claimant's attorney, respondent's attorney and the Special Administrative Law Judge resulted in both claimant and respondent providing the Special Administrative Law Judge with additional medical reports subsequent to the preliminary hearing. Claimant's additional medical was submitted on January 11, 1996. Respondent submitted additional medical on January 16, 1996 and, in the same letter, requested a five-day extension to submit additional medical records from Dr. Brady.

Special Administrative Law Judge Morrissey did not issue his opinion until January 30, 1996, substantially beyond the five days requested by respondent to provide additional medical. The Appeals Board finds respondent's request that this matter be reversed based upon the allegations that the Special Administrative Law Judge exceeded his authority in issues 2 and 3 listed above should be, and is, denied.

The respondent next alleges the Special Administrative Law Judge exceeded his authority by ordering temporary total disability compensation without deciding the jurisdictional issues of whether claimant suffered accidental injury and whether claimant's accidental injury arose out of and in the course of his employment. The Appeals Board finds that the Special Administrative Law Judge, in granting claimant temporary benefits and ongoing medical treatment, by implication, has found that claimant suffered accidental injury and further found that claimant's accidental injury arose out of and in the course of his employment with the respondent.

Regarding the issue of ongoing medical treatment, the Appeals Board acknowledges both claimant and respondent contacted the Special Administrative Law Judge by letter dated January 19, 1996 and advised the Special Administrative Law Judge that the issue of ongoing medical treatment had been resolved and was no longer before the Special Administrative Law Judge. The only remaining issue to be decided at that time was claimant's entitlement to temporary total disability compensation. As such, the Appeals Board finds the Special Administrative Law Judge did exceed his jurisdiction in ordering respondent to provide medical treatment with Dr. Sankoorikal as this issue was no longer before the Special Administrative Law Judge for his consideration.

The Appeals Board must next consider whether claimant has proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment with the respondent.

K.S.A. 44-501 as amended by 5.4.649 (1996) and K.S.A. 44-508(g) as amended by 5.4.649 (1996) make it claimant's burden to prove by a preponderance of the credible evidence that claimant is entitled to an award of compensation by proving the various conditions upon which claimant right depends.

The evidence in the instant case fails to support claimant's contention that he suffered accidental injury on the date alleged. Claimant claims accidental injury on September 25, 1995. Claimant alleged that Mr. Tim Holly, breakfast cook, was aware of his injury as claimant had advised him of the problems he experienced. Claimant further alleged he advised several other employees of respondent of his injury.

Ms. Kyle Cloutier, general manager for respondent, testified that until claimant discussed this matter with her on September 29, 1995, she was unaware claimant had experienced any problems arising out of and in the course of his employment with respondent. She did acknowledge claimant had ongoing symptomatology due to a prior back injury suffered before claimant began working with respondent. Claimant had requested an advance on his first paycheck in order to buy pain pills which he alleged he needed as a result of this 1994 injury. Claimant acknowledged, in his deposition, that he experienced ongoing symptomatology in his low back and that he had filed other workers compensation claims as a result of ongoing back difficulties prior to his employment with respondent.

Claimant had also experienced numerous cuts while working with respondent and on each occasion had advised respondent immediately of his injuries.

Claimant alleged that Mr. Holly, the breakfast cook, was aware of his injury. Mr. Holly opined he had never heard comments from claimant regarding any injuries suffered by claimant while claimant was employed with respondent. He went on to volunteer that the of alleged injury, Monday, would normally not require trash dumping as the restaurant was not open on Sunday evening and the Sunday supervisor made it a policy to empty all trash on Sunday afternoons when the restaurant was cleaned after closing.

Ms. Cloutier testified regarding claimant's comments to her on September 29 when he first made her aware of the alleged injury. At that time claimant apparently opened the conversation by requesting a raise and then inferred that if he obtained the raise the workers compensation claim would not be pursued.

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Appeals Board finds claimant has failed in his burden of proving that he suffered accidental injury arising out of and in the course of his employment with respondent. The contradictory testimony of claimant's witnesses, especially that of Mr. Holly, does significant damage to claimant's credibility. The Appeals Board, therefore, finds the Award by Special Administrative Law Judge William F. Morrissey granting claimant temporary total disability compensation should be, and is hereby, reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Special Administrative Law Judge William F. Morrissey dated January 30, 1996, should be, and is hereby, reversed and claimant is denied compensation against respondent and its insurance carrier stemming from alleged injuries of September 25, 1995.

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

- c: Larry T. Hughes, Topeka, Kansas
Patricia A. Wohlford, Overland Park, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director